# No. 14,089

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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MICHAEL CAMPODONICO,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

**On Appeal from the District Court of the United States for the Northern District of California.**

## BRIEF FOR THE UNITED STATES.

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**A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.**

The appellant, Michael Campodonico, was indicted on November 26, 1951, in the District Court for the Northern District of California, Northern Division, as follows:

Count One—for willful and knowing attempt to evade and defeat income tax due and owing by him and his wife for the year 1946, by means of the filing of a fraudulent joint income tax return which understated their income tax in the amount of $11,730.98.

Count Two—for willful and knowing attempt to evade and defeat income tax due and owing by him for the year 1947, by means of the filing of a fraudulent income tax return which understated his income tax in the amount of $2,237.47.

Count Three—for willful and knowing attempt to evade and defeat income tax due and owing by his wife, Esther Campodonico, for the year 1947, by means of the filing of a fraudulent income tax return which understated her income tax in the amount of $2,317.97.

Count Four—for willful and knowing attempt to evade and defeat income tax due and owing by him and his wife for the year 1948, by means of the filing of a fraudulent joint income tax return which understated their income tax in the amount of $488.52.

Count Five—for willful and knowing attempt to evade and defeat income tax due and owning by him and his wife for the year 1949, by means of the filing of a fraudulent joint income tax return which understated their income tax in the amount of $4,775.94.

The appellant was arraigned on November 30, 1951, before United States District Judge Dal M. Lemmon, at which time appellant entered a plea of not guilty to each count of the indictment. The case came on for trial on May 13, 1952, before the Honorable Oliver J. Carter, judge. Jury trial was waived by the appellant. (R. 30.) At the close of the Government's case, on May 14, 1952, the appellant moved for judgment of

acquittal (R. 228), and the trial was continued until further order of the Court in order that briefs might be submitted and appellant's motion be given full consideration by the Court. On August 8, 1952, appellant's motion for acquittal was denied (R. 233), and the United States reopened its case in chief for further testimony. (R. 234.) On August 8, 1952, appellant's motion for judgment of acquittal was renewed and denied, the appellant rested, and the case was continued to September 5, 1952, for final argument, on which date the case was submitted.

On June 13, 1953, Judge Oliver J. Carter adjudged the appellant guilty as charged in each count of the indictment. On July 17, 1953, appellant moved for arrest of judgment, which was denied, and a motion for judgment of acquittal was granted as to Counts 4 and 5. Motion for a new trial was also denied on that date. On July 17, 1953, Judge Carter sentenced the appellant to imprisonment for a period of 18 months and a fine of $5,000 on Count 1; to imprisonment for a period of 18 months on Count 2, said terms of imprisonment to run concurrently; and to no imprisonment or fine as to Count 3. Notice of appeal was filed on July 27, 1953, and bail on appeal was set at $6,000.

## STATUTE INVOLVED.

Title 26, Int. Rev. Code; Sec. 145(b).

PENALTIES.

* * * * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

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## STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

During the year 1946 and until May of 1947, the appellant, Michael Campodonico, was employed by the Union Club, an illegal gambling house at Stockton, California, as floor man, bouncer, and substitute manager. (R. 91.) He had been so employed since 1943 or 1944. (R. 91.) Prior to 1946, the appellant, by his own admission, had engaged in illegal occupations since the 1920's: In the early 1920's he was a bootlegger (Ex. 7, p. 3); from 1927 to 1937 he was a bootlegger and a gambler (Ex. 7, p. 6); for the years 1937 to 1942 he gambled and played the horses (Ex. 7,

## Computation of Unreported Income on Net Worth Basis.
## Computation of Net Worth as of December 31,

| ASSETS | 1945 | 1946 | 1947 | 1948 | 1949 | Source | Reference Page |
|---|---|---|---|---|---|---|---|
| Cash on hand from Baker St. property | $ | $23,247.25 | $ | $ | $ | Sale of house | 49, 115, 167 |
| Herrera Deed of Trust | | 1,902.44 | | | | | 115, 184 |
| 1130 Victoria St.—Residence | 6,000.00 | 6,000.00 | | | | Currency | 51, 52, 109, 115 |
| Fence on above property | 100.00 | 100.00 | | | | | 109, 115 |
| Swanson Deed of Trust | | | 7,221.91 | 6,654.78 | 6,040.22 | Sale of house | 45, 115 |
| B/A Hunter Sq. Savings a/c 8423 | | | 498.29 | 1,507.16 | 2,532.53 | Collection | 45, 46, 115, 117 |
| Capitola Partnership 50% interest | | | 17,830.59 | 18,788.91 | 17,968.88 | Currency | 57 to 63, 116 |
| Mercury Station Wagon | | 3,076.00 | 3,076.00 | 3,076.00 | 3,076.00 | | 59, 116 |
| 6009 Pacific—Residence | | | {12,551.67 | {12,551.67 | {12,551.67 | Currency | 52, 116 |
| | | | { 1,000.00 | { 1,000.00 | { 1,000.00 | Currency | 53 |
| Improvements—Nomellini | | | 15,288.00 | 15,288.00 | 15,288.00 | Currency | 54, 116 |
| Small bldg. added | | | | | 600.00 | | 117, 122 |
| Mandalari Deed of Trust | | | | | 20,000.00 | Currency | 65 to 70, 117 |
| Garwood speedboat | | 3,009.40 | 3,009.40 | 3,009.40 | 3,009.40 | Currency | 56, 115, 117 |
| 1946 Pontiac | | 1,800.00 | 1,800.00 | | | | 115, 116 |
| 1948 Cadillac | | | | 3,924.02 | 3,924.02 | Currency | 56 |
| 1940 Hudson | 750.00 | | | | | | 57, 109 |
| 1946 Chevrolet Station Wagon | | 2,011.58 | 2,011.58 | 2,011.58 | 2,011.58 | Currency | 57, 115, 117 |
| 1948 Pontiac Coupe | | | | 2,608.80 | 2,608.80 | Currency | 57 |
| War Bonds | 3,675.00 | 3,675.00 | 3,675.00 | 3,675.00 | 3,675.00 | | 109, 110, 111, 115, 117 |
| Total assets | $10,525.00 | $44,821.67 | $67,962.44 | $74,095.32 | $94,286.10 | | |
| **LIABILITIES** | | | | | | | |
| None | | | | | | | 115 |
| Net Worth | $10,525.00 | $44,821.67 | $67,962.44 | $74,095.32 | $94,286.10 | | |
| Net Worth previous year | | 10,525.00 | 44,821.67 | 67,962.44 | 74,095.32 | | |
| Increase in Net Worth | | $34,296.67 | $23,140.77 | †$ 6,132.88 | $20,190.78 | | 120, 213, 215 |
| Non-taxable portion of capital gains | | | (2,200.00) | | | | 121, 213 |
| Taxes paid | | 166.76 | 143.74 | 804.73 | 295.00 | | 38, 117, 213 |
| Living Expenses | | 720.00 | 720.00 | 720.00 | 720.00 | | 117, 213, 215 |
| Adjusted Gross Income | | $35,183.43 | $21,804.71 | $ 7,657.61 | $21,205.78 | | 213, 214 |
| Income per returns | | 3,814.81 | 6,080.89 | ‡ 3,395.43 | 4,617.05 | | 18, 19, 20, 21 |
| Unreported Income | | $31,368.62 | $15,723.82 | $ 4,262.18 | $16,588.73 | | |
| Total tax liability as corrected | | $14,030.77 | *$ 2,314.96 | $ 904.00 | $ 4,129.40 | | 213, 214, 215 |
| Tax disclosed on returns | | 369.00 | * 327.00 | 205.00 | 392.00 | | 18, 20, 21 |
| Deficiency (tax evaded) | | $13,661.77 | *$ 1,987.96 | $ 699.00 | $ 3,737.40 | | |
| Total tax liability—Esther Campodonico—wife | | | *$ 2,476.46 | | | | 19 |
| Tax disclosed on return | | | * 427.00 | | | | |
| Deficiency (tax evaded) | | | *$ 2,049.46 | | | | |
| Total tax evaded for 1947 | | | $ 4,037.42 | | | | |

*For the year 1947—Separate returns were filed by husband and wife.

†Increase net forth for 1948 per R. 120 $6,297.08, also R. 214.

‡Amount shown in R. 20 $3,396.43.

## Expenditures for Assets.

| INCREASE IN ASSETS | 1946 | 1947 | 1948 | 1949 | Source | Reference Page |
|---|---|---|---|---|---|---|
| Cash on hand | $23,247.25 | $ | $ | $ | Currency | 49 |
| Herrera Deed of Trust | 1,902.44 | | | | | 50* |
| Mercury Station Wagon | 3,076.00 | | | | Currency | 58, 59 |
| Garwood Speedboat | 3,009.40 | | | | Currency | 56 |
| 1946 Pontiac | 1,800.00 | | | | | |
| 1946 Chevrolet Station Wagon | 2,011.58 | | | | | |
| Swanson Deed of Trust | | 7,221.91 | | | | 45 |
| B/A Hunter Sq. Savings a/c | | 498.29 | 1,008.87 | 1,025.37 | | 45 |
| Capitola Liquor Store—Part interest | | 17,830.59 | 958.32 | | Currency | 57,58, 63 |
| 6009 Pacific Ave. (residence) | | 13,551.67 | | | Currency | 52, 53 |
| 6009 Pacific Ave. (improvements) | | 15,288.00 | | | Currency | 54 |
| 1948 Cadillac | | | 3,924.02 | | Currency | 56 |
| 1948 Pontiac Coupe | | | 2,608.80 | | Currency | 56, 57 |
| Building—Pacific Ave. | | | | 600.00 | | |
| Mandalari Deed of Trust | | | | 20,000.00 | Currency | 65 to 70 |
| Total increase | $35,046.67 | $54,390.46 | $ 8,500.01 | $21,625.37 | | |
| **DECREASE IN ASSETS** | | | | | | |
| 1940 Hudson | 750.00 | | | | | |
| Cash on hand | | 23,247.25 | | | | |
| 1130 Victoria St. (residence) | | 6,000.00 | | | | |
| Fence at 1130 Victoria St. | | 100.00 | | | | |
| Herrera Deed of Trust | | 1,902.44 | | | | |
| 1946 Pontiac | | | 1,800.00 | | | |
| Swanson Deed of Trust | | | 567.13 | 614.56 | | |
| Capitola Liquor Store—Part interest | | | | 820.03 | | |
| Total decrease | $ 750.00 | $31,249.69 | $ 2,367.13 | $ 1,434.59 | | |
| *Net Expenditures for Assets | $34,296.67 | $23,140.77 | $ 6,132.88 | $20,190.78 | | |

*Reflected in increase in net worth

| | |
|---|---|
| Net Worth 12/31/49 | $94,286.10 |
| Net Worth 12/31/45 | 10,525.00 |
| Increase | $83,761.10 |

| Net Increase | |
|---|---|
| 1946 | $34,296.67 |
| 1947 | 23,140.77 |
| 1948 | 6,132.88 |
| 1949 | 20,190.78 |
| Total | $83,761.10 |

p. 11); in 1942 he also worked for a bookie joint (Ex. 7, p. 13); from 1942 to May, 1947, he was employed by the Union Club, and gambled on his own account (Ex. 7, p. 15); since May of 1947 he has had an interest in a liquor store at Capitola, California, and gambled with cards and horses. (Ex. 7, p. 19.) He was known as a pimp and a gambler to the Police Department. (R. 171, 188.)

The income tax returns of the appellant and his wife for the years 1945 to 1949, incl., disclose that the appellant reported as income his salary from the Union Club, partnership income from the Capitola liquor store, and a small amount of miscellaneous income consisting mainly of interest and capital gains. (Exs. 1-6, incl.) The returns for the years 1945 to 1949, incl., were prepared by Eva McNabb. (R. 73.) She asked the appellant if he had any further income, to which his answer was "No." (R. 76, 77.) At the time the returns were prepared, she also discussed with the appellant the fact that gambling income was taxable. (R. 84.)

A net income far in excess of that reported by the appellant on his returns for the years 1946 to 1949, inclusive, was shown by the Government through the use of net worth and expenditure computations. The individual items making up the computations were for the most part stipulated by the appellant. Certain other items, however, were the subject of independent proof. The net worth of the appellant, together with record references in support thereof, and the manner of acquisition was shown as follows (Inserted opposite):

Out of all of the above items, appellant's brief reveals the only item questioned is that of cash on hand. Nor was the expense or other assets of the appellant as of January 1, 1946, shown or even questioned by the appellant, with the single exception of his disagreement with respect to cash on hand.

The officers of the Bureau of Internal Revenue made an investigation to determine whether or not the appellant could have had any cash on hand at the end of the years 1945, 1946 and 1947. They found no evidence of any cash on hand at the end of 1945 (R. 115); however, on December 31, 1946, they were able to determine that the appellant had approximately $23,247.25 in cash on hand, since he sold some property in July 1946 and received cash in that amount before the end of that year, and in view of the fact that the appellant had made no substantial purchases after the sale and before the end of the year 1946. (R. 115.) Included in the investigation which they made in order to ascertain cash on hand was an examination and review of earlier income tax returns filed by the appellant for the years 1940 to 1945, inclusive. They were able to ascertain that the following taxes for those years were paid by the appellant and to compute therefrom the approximate amount of income reported by the appellant for those years. The returns themselves prior to the year 1945 had been destroyed as obsolete files at the time of trial, however the records as to the amount of tax paid were available. (R. 173.) The income computed

therefrom for the years 1940 to 1945, inclusive, is as follows:

| *Year* | *Tax* | *Net Income* |
|---|---|---|
| 1940 | $ 71.84 | Less than $5,000.00 |
| 1941 | 160.74 | do. |
| 1942 | Forgiven | do. |
| 1943 | $226.24 | $3,899.64 |
| 1944 | 18.80 | 2,754.00 |
| 1945 | 438.00 | 3,211.47 |

No tax is known to have been paid by the appellant prior to the year 1940. (R. 172.)

Chester R. Taynton, internal revenue agent, also investigated the possible receipt by the appellant of money from nontaxable sources such as gifts and inheritances. A search of the county records by Taynton was unfruitful in this respect, and the appellant stated to Taynton that he had not received any gifts, inheritances or nontaxable income. (R. 168.)

As above set out, the Government's evidence disclosed the expenditure by the appellant of large amounts of currency during the years 1946 to 1949, inclusive. These expenditures were far in excess of the total income reported on all of the appellant's income tax returns since 1940. In addition to the uncontroverted proof of net worth and expenditures, the Government produced witnesses who testified to possible sources of the currency used by the appellant in augmenting his physical net worth.

1. Rosario Mandalari testified that he borrowed $20,000 from Campodonico in November of 1949, in

cash. (R. 66.) He also testified that he gambled with the appellant for small stakes in pinochle and "pan" games. (R. 66, 68.) The appellant in the sworn statement which he gave to the examining officers during the course of the investigation on May 4, 1950, stated that he played a little cards once in a while during the period here involved and managed to win consistently (Ex. 7) so that he could "keep the wolf away from the door." (Ex. 7, p. 19.)

2. Eva McNabb testified that she has known the appellant for many years and prepared his returns for the years 1945 to 1949, inclusive. (R. 73.) She received the necessary information from the appellant and from the W-2 Form which she herself had prepared in her capacity as the bookkeeper for the Union Club. (R. 73.) The returns themselves show that no income from gambling was reported by the appellant. (Exs. 1-6, incl.) Mrs. McNabb asked the appellant whether or not he had any other income, and he stated that that was all he had. (R. 77.) She further stated that at the time of the preparation of each of the returns in question she had discussed with Campodonico the fact that income from gambling was taxable. (R. 84, 85.)

3. Joe Gianelli testified that he was the manager of the Union Club during the time that Campodonico worked there and that Campodonico was a floor man, bouncer, and took care of the games when Gianelli was away. (R. 90, 91.) He stated that the club closed in May of 1947, when the town was closed down. (R.

91.) At times when Gianelli was away from the club, Campodonico would make the accounting at the end of the evening with the various dealers for the games and would place the receipts in the safe. The club receipts would be as high as $300 or $400 on some days. (R. 94, 95.)

4. Chester R. Taynton, internal revenue agent, testified at some length as to his investigation of the tax liabilities of the appellant. He asked the appellant for his books and records, but received none (R. 107), and appellant told him he kept none. (R. 169.) He thereupon examined the public records, inquired at all local banks, made an audit of the books of the Capitola liquor store, and questioned the appellant in order to determine his net worth at the end of the years 1945 to 1949, inclusive. (R. 109.) This investigation disclosed the various assets that are set out above in tabular form (*ante,* p. 5), the greater part of which were submitted to the Court by stipulation of the appellant.

In Taynton's conversations with the appellant, the appellant claimed that he had varying sums of cash on hand at the end of the year 1945 but Taynton was unable to find any evidence that the appellant could have had cash on hand at that time. (R. 115.)

Taynton's investigation disclosed that the appellant had no liabilities at the end of any of the years in question. (R. 115.) Non-taxable personal expenditures were estimated by the appellant to Taynton at $60 a month, and taxes paid during the years 1946 to

1949, inclusive, were shown to be nominal in amount. (R. 117.) In computing the appellant's net income on the basis of net worth and expenditures, the amount of $2,200, a nontaxable portion of a capital gain, was allowed. (R. 120, 121.)

Taynton asked the appellant where he got all the money to buy his visible assets when he hadn't reported that much income, and the appellant said he made it gambling; that he was a gambler. (R. 170, 171.)

For the prior years the records of the Bureau of Internal Revenue disclosed that Campodonico had reported nominal amounts of income so that the accumulation of substantial cash by the end of the year 1945 would have been impossible unless it is assumed that the appellant was a tax evader during the prior years. (R. 175.)

In addition to the above independent evidence of the appellant's occupation and financial transactions, there was considerable reliable testimony placed in the record with respect to the appellant's statements and activities during the course of the investigation which clearly indicated his knowledge of guilt and intent to evade his income taxes during the years involved.

1. Margaret B. Rhodes testified that she took and transcribed notes of a statement made by the appellant to the internal revenue agents on May 4, 1950. The statement was placed in evidence as Exhibit 7.

It contains, among other things, appellant's admissions with respect to the assets which he acquired during the years 1946 to 1949, inclusive, which are substantially in accord with the assets discovered by Revenue Agent Taynton during the course of his investigation and with those to which appellant stipulated during the course of the trial. Appellant stated that he worked for the Union Club from 1942 until May or June of 1947 for wages and that he did a little gambling in the club on his own individual account, as a result of which he won quite a bit of money, approximately $25,000 or $30,000. (Ex. 7, p. 15.) He stated that he had about $80,000 in property and cash around the end of 1947. (Ex. 7, pp. 16, 17.) He stated that since May or June of 1947 he had, in addition to his interest in the liquor store at Capitola, played a little cards and the horses, as a result of which he managed to win enough to keep the wolf from the door. (Ex. 7, p. 19.) He stated he had never received any money by way of inheritance or gift (Ex. 7, p. 24) and that his household and living expenses would not run over $60 a month (Ex. 7, p. 29). He lived in a small house which he had purchased at 1130 Victoria Avenue, Stockton, in 1942, for $6,000 until 1947, when he moved to 6009 Pacific Avenue, for which he paid $13,000 and made improvements of approximately $13,000, giving a total cost for the new home of $26,000. He refused to answer whether or not he had received income other than that reported on his returns for the years 1946 and

1947 on grounds of self-incrimination. (Ex. 7, pp. 41, 42.)

With respect to currency accumulations, Campodonico told the agents that he had managed to save considerable cash from his illegal bootlegging, bookmaking and gambling operations in the 1920's and 1930's (Ex. 7, pp. 3, 5, 6, 7, 8, 12) although he never actually counted it. At the end of 1942, he said he had approximately $50,000 buried at his father's place at 925 South Sutter Street (Ex. 7, p. 12); by the end of 1947 he said he had approximately $80,000 in cash and properties (Ex. 7, pp. 16, 17). He later stated that he had around $50,000 in cash, which he placed in his safety deposit box at the Bank of America in 1944, and that from 1944 to 1947 he drew currency out of the box rather than making further deposits. (Ex. 7, p. 18.) He stated that he had not paid income taxes on this money that he had around because he had never heard anything about income tax. (Ex. 7, pp. 38, 39.)

2. Chester R. Taynton, internal revenue agent, first interviewed the appellant on March 27, 1950. (R. 168.) At that time he asked the appellant, in the presence of Mrs. McNabb, where he got all of the money to buy the assets that he had acquired when he hadn't reported that much income. Campodonico told him that he made it gambling. (R. 170.) He stated his occupation to be that of a gambler at that time. (R. 171.)

3. Eva McNabb testified that she had a telephone conversation with the appellant on May 4, 1950, just after he had given his statement to the internal revenue agents, which is in evidence as Exhibit 7. (R. 195.) In response to her question, "How did you come out?" he answered, "Pretty good up until the end," and then said, "Then I mentioned that I made some money gambling," and "I caught hell from Mr. Seaman." (R. 195.)

4. Wareham C. Seaman was called as a witness for the Government. Mr. Seaman is a tax attorney practicing in Stockton, California, and was retained by the appellant as his counsel. (R. 98, 99.) The attorney-client privilege was waived by the appellant with respect to Mr. Seaman's testimony. (R. 153.)

Mr. Seaman accompanied the appellant at the time he made his statement to the internal revenue agents on May 4, 1950, which is in evidence as Exhibit 7. (R. 99.)

Mr. Seaman further testified to a conference which he and appellant had with the internal revenue agents on May 31, 1950, in his office. (R. 139.) Special Agent Atkins presented the transcript of the statement that Campodonico had made to the agents on May 4, 1950, and asked him to sign it. (R. 141.) Mr. Campodonico stated that he refused to sign the statement because it did not represent the truth, and when Atkins requested that Campodonico make another statement of what would be the truth, the appellant refused on the advice of Seaman.

Seaman further testified that the appellant made a deposition in another Court proceedings on March 27, 1951. (R. 142.) In that deposition Campodonico admitted that he told Seaman that he made money gambling during the years 1943 to 1951 which he did not report on his income tax returns. (R. 146, 147.)

The attorney-client privilege was waived by the appellant with respect to the testimony of Mr. Seaman during cross-examination (R. 153) and, on redirect examination, Mr. Seaman testified that Campodonico made four conflicting statements to him with respect to the source of his visible increase in net worth. His first position was that this money had been accumulated from gambling, prostitution and bootlegging prior to 1943. (R. 157.) His second was that he had accumulated all but $45,000 of his visible increase in net worth prior to 1943 from prostitution, gambling and bootlegging, and that subsequent to 1943 and until May of 1947 the remainder of such visible increase was derived from funds which he had embezzled from the Union Club. (R. 158.) His third position was that all of the visible increase in net worth had been embezzled from the Union Club (R. 158), and his fourth position was that $40,000 of his visible increase in net worth had come from his gambling activities in 1943 through 1949 (R. 158). The latter three positions taken by the appellant were subsequent to the statement which he gave to the officers of the Bureau of Internal Revenue on May 4, 1950. (R. 159.)

5. Eva McNabb testified as to the telephone conversation which she had with the appellant on or about May 31, 1950, at the time when he refused to sign the statement in evidence as Exhibit 7. The appellant told her at that time that he refused to sign the statement; that Mr. Seaman would not let him sign the statement because they were going to use embezzlement as their defense. She then asked him whom he embezzled the money from, and he said he embezzled it from the Union Club—Harry Hill, his employer. She then asked him if he intended to pay it back and he said ' "Hell, no" '. She further testified that she kept the books of the Union Club during the period that Campodonico was employed at that establishment but had never found any evidence that he had embezzled any moneys. (R. 196.)

6. Joe Gianelli, the manager of the Union Club, testified that the receipts of the club were normal during the times that Campodonico assumed the managerial duties. (R. 202, 203, 207, 211.)

At the close of the Government's case, the defense introduced records of safety deposit boxes held by the appellant and/or his wife during the years 1936 to 1951 (R. 299, 300), and a stipulation was made that the appellant sold a boat on September 3, 1942, for $2,000. The appellant did not take the stand and did not present further evidence.

## QUESTIONS PRESENTED IN THIS CASE.

(1) Is the evidence sufficient to support a verdict of guilty on Counts 1, 2, and 3 of the indictment?

(2) Was there sufficient proof of a corpus delicti to warrant admission of the testimony of the agents of the Bureau of Internal Revenue, Wareham C. Seaman, and Eva McNabb concerning statements made to them by the appellant?

(3) Is the delay of 14 months between the start of the trial to the Court, the jury having been waived, and the pronouncement of judgment a denial of an appellant's right to a speedy trial, in violation of the Sixth Amendment to the United States Constitution?

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## ARGUMENT.

### I. THE EVIDENCE SUPPORTS THE VERDICT OF GUILTY AS TO THE FIRST THREE COUNTS OF THE INDICTMENT.

#### A. SCOPE OF REVIEW OF APPELLATE COURT.

It is a well-established principle that an Appellate Court will indulge in all reasonable presumptions in support of the ruling of a trial Court, and therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

*Henderson v. United States,* 143 F. 2d 681 (C. C.A. 9th);

*Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

*Norwitt v. United States,* 195 F. 2d 127 (C.A. 9th), cert. den. 344 U.S. 817;

*Bell v. United States,* 185 F. 2d 302, 308 (C.A. 4th), cert. den. 340 U.S. 930;

*Gendelman v. United States,* 191 F. 2d 993 (C.A. 9th), cert. den. 342 U.S. 909.

The proof in a criminal case need not exclude all possible doubt but "need go no further than reach that degree of probability where the general experience of men suggests that it is past the mark of reasonable doubt."

*Henderson v. United States,* 143 F. 2d 681 (C. C.A. 9th);

*Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

*Norwitt v. United States,* 195 F. 2d 127 (C.A. 9th), cert. den. 344 U.S. 817.

The measure of reasonable doubt is generally said not to apply to specific detailed facts but only to the whole issue. Wigmore on Evidence (3d ed. 1940), Sec. 2497, p. 324.

An Appellate Court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the trial Court.

*Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

*United States v. Socony-Vacuum Oil Company,* 310 U.S. 150, 154;

*Gendelman v. United States,* 191 F. 2d 993 (C. A. 9th), cert. den. 342 U.S. 909.

In connection with circumstantial evidence, this Court in

*Stoppelli v. United States,* 183 F. 2d 391 (C.A. 9th), cert. den. 340 U.S. 864,

has recently stated the rule to be as follows at page 393:

> "The testimony of the fingerprint expert was sufficient to go to the jury if its nature was such that reasonable minds could differ as to whether inferences other than guilt could be drawn from it. It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence. Curley v. United States, 81 U.S. App. D.C. 229, 160 F. 2d 229, 230. In the cited case, Judge Prettyman pertinently observes: 'If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case.' 160 F. 2d at page

233. See also United States v. Perillo, 2 Cir., 164 F. 2d 645."

See also:

*Norwitt v. United States,* 195 F. 2d 127 (C.A. 9th), cert. den. 344 U.S. 817;

*Gendelman v. United States,* 191 F. 2d 993 (C. A. 9th), cert. den. 342 U.S. 909;

*Davena v. United States,* 198 F. 2d 230 (C.A. 9th), cert. den. 344 U.S. 878;

*Barcott v. United States,* 169 F. 2d 929 (C.C.A. 9th), cert. den. 336 U.S. 912.

Pursuant to the provisions of Rule 23, Federal Rules of Criminal Procedure, the appellant waived a jury trial in writing. (R. 30.) No request to find the facts specially was made by the appellant under the provisions of Rule 23(c), Federal Rules of Criminal Procedure.

The scope of review of the Appellate Court with respect to the trial of a case by the Court sitting without a jury appears to be generally the same as in those cases wherein a jury verdict has been rendered, at least insofar as criminal cases are concerned. *Cf. Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83; *Henderson v. United States,* 143 F. 2d 681 (C.C.A. 9th); *Danziger v. United States,* 161 F. 2d 299, cert. den. 332 U.S. 769; *Jabczynski v. United States,* 53 F. 2d 1014, 1015 (C.C.A. 7th, 1931), cert. den. 285 U.S. 546.

In the latter case, appellants were charged with violation of the National Prohibition Act. After deciding that there had been a proper waiver of a jury trial by the appellants, the Circuit Court stated as follows:

> "The second question presented is whether or not there is evidence to support the finding of the trial court. * * * There is evidence tending to establish the guilt of the defendants, as charged in the indictment, and there is also evidence given by the defendants tending to establish their innocence of those charges.
>
> "No good purpose will be served by discussing at length the testimony of the various witnesses. A careful examination of all the testimony convinces us that there is evidence from which the trial judge was justified in arriving at the conclusion that the defendants are guilty as charged. Having thus determined, this court cannot disturb such finding. Burton v. United States, 202 U.S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Harley v. United States (C.C.A.) 269 F. 384; Allen v. United States (C.C.A.) 4 F. (2d) 688."

Further, the principle that where the trial Court sits without a jury in a criminal case, all questions of credibility of witnesses are for his determination and for his determination alone.

> *Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

*Danziger v. United States,* 161 F. 2d 299, cert. den. 332 U.S. 769;

*Newman v. United States,* 156 F. 2d 8, cert. den., sub. nom.;

*Cain v. United States,* 329 U.S. 760, 91 L. Ed. 655, 67 S.Ct. 115.

Furthermore, in criminal cases where a jury has been waived by the appellant, the usual rule obtains that the Appellate Court is not concerned with the weight of the testimony adduced in the trial Court, since all questions of credibility are for the trial Court.

*Pasadena Research Laboratories v. United States,* 169 F. 2d 375, 380 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

*Newman v. United States,* 156 F. 2d 8, cert. den., sub. nom.

An important difference, however, in the scope of appellate review where a criminal case is tried without a jury is found in the presumption that the trial judge considers only competent evidence in arriving at his verdict.

*Pasadena Research Laboratories v. United States,* 169 F. 2d 375, 385 (C.C.A. 9th), cert. den. 335 U.S. 853, 69 S.Ct. 83;

*Hoffman v. United States,* 87 F. 2d 410, 411.

Since no request was made by the appellant for a finding of the facts specially as provided by Rule 23(c), Federal Rules of Criminal Procedure, the circuit Court must state the facts, where supported by

the evidence, as those which would support the judgments. *Blunden v. United States*, 169 F. 2d 991, 992, and cases therein cited.

In the statement of facts in the appellant's brief, beginning at page 11, it is obvious that appellant has paid no attention whatsoever to the rule as clearly set out in the above cited cases that the evidence must be considered in the light most favorable to the prosecution. Appellant, for the most part, sets out portions of the testimony of various witnesses and by far the greater part of the excerpts consists of testimony given under cross-examination by appellant's counsel in response to leading questions. It is clear that appellant considers the facts in the light most favorable to the appellant and not to the Government, and this reversal of viewpoint runs throughout the thread of the argument set out in the brief as well as in the alleged statement of facts.

**B. SINCE THE SENTENCE IMPOSED, INCLUDING THE FINE, DID NOT EXCEED THAT WHICH MIGHT LAWFULLY HAVE BEEN IMPOSED UNDER ANY SINGLE COUNT, THE JUDGMENT UPON THE VERDICT MUST BE AFFIRMED IF THE EVIDENCE SUSTAINS THE CONVICTION ON ANY ONE COUNT.**

The appellant was sentenced to eighteen months imprisonment on Counts 1 and 2, the sentence to run concurrently, and, in addition, the appellant was fined the sum of $5,000 on Count 1, plus Court costs. No sentence was imposed on Count 3.

It has long been the rule that if the sentence imposed did not exceed that which might lawfully have

been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts.

*Abrams v. United States,* 250 U.S. 616, 619;
*Pierce v. United States,* 252 U.S. 239, 252, 253;
*United States v. Trenton Potteries,* 273 U.S. 392, 401, 402;
*Sinclair v. United States,* 279 U.S. 263, 299;
*Whitfield v. Ohio,* 297 U.S. 431, 438;
*Norwitt v. United States,* 195 F. 2d 127 (C.A. 9th), cert. den. 344, U.S. 817.

The concurrent sentences of eighteen months on Counts 1 and 2 and the fine of $5,000 on Count 1 were within the maximum specified for any one count in 26 U.S.C.A., Section 145(b), which is five years imprisonment or $10,000 fine, or both, together with cost of prosecution.

### C. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE DETERMINATION OF THE TRIAL COURT THAT INCOME WAS WILLFULLY OMITTED BY THE APPELLANT FROM HIS INCOME TAX RETURNS FOR THE YEARS 1946 AND 1947.

#### (1) The Government was entitled to rely upon proof of income by the methods of net worth increase and expenditures.

The appellant raises as one of the questions presented in this appeal the right of the Government to rely on the use of the net worth and expenditures methods of computation of taxable income. It does not appear that this question is the subject of further argument in his brief, however. The testimony of Revenue Agent Taynton is that he asked the appel-

lant for his books and records at the initiation of the investigation and the appellant stated he kept none. (R. 107.)

It is clear that where the books and records of a taxpayer are inadequate or, as in this case, nonexistent, the Government has a right to compute income on the basis which it determines most likely to reflect true income. Title 26, U.S.C.A., Section 41; *Remmer v. United States,* 205 F. 2d 277, (C.A. 9th 1953).

After all, evidence of net worth and expenditures constitutes circumstantial evidence of the commission of the crime, and it has long been the ruling that circumstantial evidence is permissible in criminal cases in this country.

*Peace v. United States,* 278 Fed. 180 (C.C.A. 7th 1921);

*Thacker v. United States,* 155 F. 2d 901 (C.C.A. 5th 1946);

*Rumely v. United States,* 293 Fed. 532, cert. den. 263 U.S. 713 (C.C.A. 2d 1923);

*Gleckman v. United States,* 80 F. 2d 394 (C.C. A. 8th 1935), cert. den. 297 U.S. 709.

**(2) There was sufficient evidence of an increase in net worth and of expenditures not accounted for by reported income to sustain the determination of the trial Court that the appellant received income during the years 1946 and 1947 which he did not report on his income tax returns.**

**(a) The Government proved an increase in net worth.**

The Government presented evidence of a net worth increase of the appellant during the years 1946 and 1947 which was far in excess of the nominal amounts of income which he reported on his returns for those years. This evidence, likewise, showed heavy expenditures in cash by the appellant which, again, were far in excess of the net income reported on the returns. No dispute exists as to any of the items making up the net worth statement of appellant at the beginning of the year 1946 or at the end of the year 1946 and at the end of the year 1947 with the single exception of cash on hand. Indeed, the larger part of the items making up the net worth and non-deductible expenditures of the appellant was stipulated at the beginning of the trial. (R. 44 to 64, incl.) The net worth of the appellant with record references in support thereof is set out in a schedule on page 5, *ante.*

An unexplained increase in net worth establishes a prima facie case of understatement of income. *United States v. Hornstein,* 176 F. 2d 217, 220 (C.A. 7th 1949); *Schuermann v. United States,* 174 F. 2d 397 (C.A. 8th 1949); *Bell v. United States,* 185 F. 2d 302 (C.A. 4th 1950). Net income may be proved by showing expenditures, purchases and investments during the taxable period. *United States v. Johnson,* 319 U.S. 503, 517; rehearing denied 320 U.S. 808; *United*

*States v. Skidmore,* 123 F. 2d 604 (C.C.A. 7th); cert. den. 315 U.S. 800.

**(b) The Government proved beginning net worth as of December 31, 1945.**

The individual items making up the net worth were for the most part stipulated by appellant. The remaining items were the subject of independent proof. Of all the items comprising the net worth, appellant's brief only questions the lack of a cash on hand item as of December 31, 1945. No evidence of any kind was introduced by the appellant to the effect that he had other or additional assets on January 1, 1946, or other or additional assets on December 31, 1946, and December 31, 1947. The examining officers testified that they found no other assets, and the further fact that the appellant was willing to stipulate as to the correctness of the Government's figures on all of these assets indicates that the examining officers' search was exceptionally thorough and its results exceptionally complete.

No, the appellant does not question the visible assets making up the net worth of the appellant at the end of the pertinent years. He questions only that invisible, intangible, unreachable asset, cash on hand. He makes the stock defense that he had in some way accumulated vast sums of money from his past activities and, squirrel-like, hid this immense fortune away until the years 1946 to 1949, inclusive, when he decided to spend it all. Peculiarly enough, he was thereupon indicted for the years 1946 to 1949, inclusive, the same years that he decided to spend all his money.

The trial Court in its memorandum and order adjudging the appellant guilty as charged had this to say with respect to the Government's proof of income by the net worth and expenditure methods:

> "The Government proceeded on the net worth theory showing expenditures during the tax years greater than the income reported by the defendant. The defendant challenges the beginning net worth in that it makes no allowance for cash on hand by the defendant. While there may be some question as to the mathematical exactness of the beginning net worth of the defendant it is sufficient to sustain the Government's position particularly in view of the fact that the defendant kept no books or records and did not offer to explain the difference between expenditures and income for the tax paid. This question has recently been disposed of in the case of Remmer v. United States (CA-9) 205 Fed. (2d) 277, decided May 28, 1953. The Court said 'In the instant case the Government thoroughly investigated appellant's potential sources of net worth. It was not incumbent upon the prosecution to prove appellant's net worth to a mathematical certainty before the case could be submitted to the jury. As the Fourth Circuit said in Bell v. United States, 185 Fed. 2d 302 (4th Cir. 1950), cert. denied 340 U.S. 930: "An estimate of the taxpayer's net worth as the means of determining his income is resorted to in the absence of accurate records which it is his duty under the statute to make and to preserve, *and by its very nature it is an approximation;* but it has been held in this and other jurisdictions to be an appropriate method to support a criminal prosecu-

> tion under the statute * * *'' (Emphasis added.) 185 F. 2d at 308. See also Gariepy v. United States, 189 F. 2d 459 (6th Cir. 1951); Schuermann v. United States, 174 F. 2d 397 (8th Cir. 1949, cert. denied 338 U.S. 831.' ''

The appellant did not see fit to take the stand and put before the Court his testimony that he had sufficient cash on hand on December 31, 1945, to account for the large increase in net worth and the large amount of expenditures in excess of his reported income. The appellant did not see fit to introduce any evidence that he had additional assets at the beginning of the year 1946, assets which were not accounted for in the Government's computation of his net worth. No, the appellant argues that the Government is required to prove a negative and not merely to prove one negative but to prove thousands of negatives.

It was the trial Court's determination from all of the evidence presented that there was sufficient proof on the part of the Government to show that some of the excess of money spent by the appellant over that reported on his income tax return was from current income. Since the Appellate Court will not look into the weight of the evidence, it is sufficient if there is evidence in the record to sustain the trial Court's determination as to this point.

The examining officers testified that they made an investigation but could find no evidence that the appellant had cash on hand as of December 31, 1945.

The appellant himself in his statements to the examining officers and to various witnesses who testified at the trial was so inconsistent as to the amounts of money he had on hand at any particular time that from the very manner in which he contradicted himself over and over again it can be inferred that a substantial portion of the net worth increase and of unaccounted-for expenditures could be from nothing but current and unreported income. Indeed, in numerous places in his brief the appellant points out that he is an accomplished perjurer. In essence, his argument is, "I am a perjurer; you can't believe me, and you can't prove how much cash on hand I had or did not have and, therefore, my perjury to agents of the Bureau of Internal Revenue prevents my conviction in this case." Contradictory statements of the appellant in themselves not only show knowledge of a guilty intent to evade taxes but are evidence in themselves that he was in receipt of taxable income during the years 1946 and 1947 which he did not report. It is noted that in this light it would not be considered as admissions of the appellant but, rather, as prime and direct evidence of the receipt of unreported income.

Cited by the appellant in his brief are those twin decisions, *Bryan v. United States,* 175 F. 2d 223 (C.A. 5th, 1949) and *United States v. Fenwick,* 177 F. 2d 488 (C.A. 7th, 1949), which have always been found distinguishable by later cases in the circuits which rendered them and by the other Courts of appeal. These cases hold that there must be some evidence in

net worth and expenditure cases to preclude the possibility that the alleged unexplained expenditures were made from accumulated prior earnings. Other authorities would appear to take the view that the various possibilities of source, other than that of current earned income, are matters of defense particularly within the knowledge of the defendant, and it is not necessary to preclude them in order for the Government to establish a prima facie case or at least that only slight evidence in this respect is required. In *Remmer v. United States,* 205 F. 2d 277, 287 (C.A. 9th, 1953), this Court stated, "If a defendant could prevent a case of this kind from being submitted to the jury merely by stating he had further assets not taken into consideration by the Government, yet refusing to disclose them, enforcement of the tax evasion provisions of the Internal Revenue Code would be completely frustrated," and in *United States v. Hornstein,* 176 F. 2d 217, 220 (C.A. 7th, 1949), the Court stated, "Evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income. It is then incumbent on the defendant to overcome the logical inferences to be drawn from the facts proved." See also *Schuermann v. United States,* 174 F. 2d 397 (C.A. 8th, 1949); *Bell v. United States,* 185 F. 2d 302 (C.A. 4th, 1950).

It is apparent that appellant in this case takes the same position that the appellant took in the case of *Pasadena Research Laboratories v. United States,* 169 F. 2d 375, 379 (C.C.A. 9th, 1948):

"While the appellants professedly recognize the rule that the Government must prove its case beyond a *reasonable* doubt, their briefs are replete with expressions which seem to indicate that in reality the standard actually insisted upon is that the appellee's evidence should remove all *possible* doubt.

While in other portions of their briefs the appellants do complain that the Government failed to adduce certain affirmative evidence, their insistence also upon the lack of *negative* evidence indicates that they are holding the appellee to too strict a standard of proof; namely, the proof of several negatives.

In Henderson v. United States, 9 Cir., 143 F. 2d 681, 682, we said:

'The proof in a criminal case need not exclude all doubt. If that were the rule, crime would be punished only by the criminal's own conscience, and organized society would be without defense against the conscienceless criminal and against the weak, the cowardly and the lazy who would seek to live on their wits. The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt.'

See also Rose v. United States, 9 Cir., 149 F. 2d 755, 759."

Taking appellant's contention literally, it is that the Government must show that the appellant did not have cash in his pocket, and that after they show that they must show that he did not have cash in his safety deposit box, and, after that, that he did not

have cash in his attic, and, after that, that he did not have cash under his mattress, and, after that, that he did not have cash buried in the yard, and so on ad infinitum. This is, indeed, the invincible barrier to proof referred to in *United States v. Johnson,* 319 U.S. 503, 518 (1943).

The *Bryan* and *Fenwick* cases appear to constitute questionable authority in their own circuits. The *Fenwick* case was overruled by the Seventh Circuit in the case of *United States v. Yeoman-Henderson, Inc.,* 193 F. 2d 867 (C.A. 7th, 1952), and it further appears to be in conflict with the prior case of *United States v. Hornstein,* 176 F. 2d 217 (C.A. 7th, 1949). The recent case of *Pollock v. United States,* 202 F. 2d 281 (C.A. 5th, 1953) severely limits the *Bryan* case. The *Bryan* case contains a dissenting opinion by Judge McCord, which has generally been more highly regarded and cited than the majority opinion:

> "The majority predicate their reversal on the sole ground that the evidence was insufficient to make out a prima facie case against the defendant on a net worth-expenditure basis, for the reason that the testimony of the government auditor did not expressly exclude the hypothesis that some of the large expenditures by defendant '*might have been* from sources other than current business income.' This is sheer speculation and conjecture, and an unwarranted presumption in favor of defendant's innocence after he has been fairly tried and convicted. Moreover, it is an unreasonable hypothesis which has already been rejected by the jury as manifestly incredible and unworthy of belief. The ultimate

effect of the decision is to shackle the government to a practically insurmountable burden of proof in net worth-expenditure cases concerning matters which are peculiarly within only an evading defendant's knowledge.

In all cases, such as here, where a defendant has either destroyed his records, or they are otherwise unavailable, the government must of necessity resort to other indirect methods of proving unreported income, such as (1) by an analysis of the defendant's bank deposits; (2) by showing an increase in net worth on the net worth-expenditure basis; or (3) by evidence of purchases, expenditures and investments made during the tax years on which the prosecution is based. Many tax offenders of the worst type would go unwhipped of justice if the government were not allowed to establish unreported taxable income by this type of circumstantial evidence. Each of the above methods is predicated upon the sound legal proposition that evidence of a large amount of unexplained funds or property in the hands of a defendant during the tax years under scrutiny establishes a prima facie case of understatement of income during that period. * * * It is then incumbent upon the defendant to go forward and offer proof in explanation of this unreported excess income, much in the same manner as would be required under the 'possession of recently stolen goods' rule. * * *

The usual contention on behalf of a defendant in this type of case is that the unexplained increase in net worth results from expenditure of funds accumulated and secreted in earlier years, for which tax prosecutions are then barred by the

> statute of limitations. Obviously, because of the difficulty and inaccessibility of such proof, the Government could not possibly wholly rebut such a contention, as only the defendant himself knows whether the defense is made in good faith. In such instances, after the Government has offered all proof available, the defendant should not be permitted to stand silently by and thwart a conviction on the claim that a failure to prove unknown assets does not satisfy net worth requirements. Manifestly, the truth and good faith of such a defense is for the jury alone."

This Honorable Court has several times indicated the questionable authority of the *Bryan* and *Fenwick* cases and in *Remmer v. United States,* 205 F. 2d 277 (C.A. 9th, 1953), commented at pages 287 as follows:

> "Reliance is placed by appellant upon the cases of Bryan v. United States, 5 Cir., 1949, 175 F. 2d 223, and United States v. Fenwick, 7 Cir., 1949, 177 F. 2d 488, where judgments of conviction were reversed because of the insufficiency of the evidence. This court, in Davena v. United States, 9 Cir., 1952, 198 F. 2d 230, 231, questioned the 'vitality' of the Fenwick case, and the majority opinion in the Bryan case was accompanied by a strong dissent. Although these decisions may well have been appropriate because of the particular facts there involved, we believe the general language of the opinions too narrowly limited the function of the jury as the triers of fact."

In the case of *McFee v. United States,* 206 F. 2d 872 (C.A. 9th, 1953), the rule is adhered to that the

amount and sufficiency of evidence to preclude the possibility that a defendant's income computed on the net worth basis may have resulted from a non-income source should be left largely to the trial judge.

> "There is no exclusive set of circumstances to foreclose the prior accumulation hypothesis. How much evidence must be offered by the prosecution before the trial court can properly submit the case to the jury depends upon the facts of the particular case. Remmer v. United States, 9 Cir., 1953, 205 F. 2d 277. The Government is not required to refute all possible speculations as to the sources of funds from which the expenditures might have been made. Gariepy v. United States, 6 Cir., 1951, 189 F. 2d 459. We view the evidence in the light most favorable to the Government and affirm if the evidence is sufficient to justify the jury in finding therefrom, beyond a reasonable doubt, that there has been a wilful attempt to evade taxes. Gendleman v. United States, 9 Cir., 1952, 191 F. 2d 993. *Id.* at p. 874."

The appellant cites the recent case of *Calderon v. United States,* 207 F. 2d 377 (C.A. 9th 1953) and statements therein as to cash on hand. In the *Calderon* case, the Government, in establishing the beginning net worth, attempted to prove a cash on hand item by extrajudicial admissions of defendant Calderon. This honorable Court held that such extrajudicial statements could not be the basis of a conviction absent some independent proof of the corpus delicti. In the case at bar, the Government made no attempt to prove the opening net worth by extra-

judicial admissions of the appellant. The appellant stipulated to a majority of the items of the opening net worth, which totalled $10,525.00. Appellant now, while not objecting to the items making up this $10,525.00, contends that the Government has to prove that he had no cash on hand. Thus, appellant does not attack the sufficiency of what the Government proved but attacks the beginning net worth on the basis that the Government did not prove that appellant did not have other assets, specifically cash on hand. This is clearly not the holding in the *Calderon* case.

To follow appellant's argument to its logical conclusion would inflict an impossible burden of proof on the Government. It would logically follow that the Government would have to affirmatively prove that defendant did not have any stocks, that he did not have any bonds, that he did not have any other valuables or securities. To prove this, the Government would have to show that a defendant did not own stock in Company "A", in Company "B", and so on, ad infinitum. This argument defeats itself when carried out to its logical conclusion, which is an absurdity. No, the *Calderon* case and the law require that the proof offered by the Government be sufficient to sustain a conviction. To argue otherwise would in effect require that the prosecution in every criminal case produce affirmative evidence in making their prima facie case which would disprove every possible alibi that the defendant might offer. This is clearly not the law.

The Government carried its burden of proof in proving the opening net worth. The investigating agents testified that they examined all the public records (R. 109), inquired at all local banks (R. 109, 113), made an audit of the books of the Capitola Liquor Store (R. 109), and made an investigation to determine appellant's beginning net worth. (R. 108, 109, 115.) The Government agents thoroughly investigated and explored every avenue which might reasonably lead to assets and cash in the hands of the appellant and determined at the conclusion of their investigation that appellant owned assets in the cost value of $10,525.00 as of December 31, 1945. In addition, the Government agents investigated appellant's past filing record of income tax returns. There was no record of income taxes having been paid by appellant prior to the year 1940 (R. 172) and the tax paid for the years 1940 to 1945, inclusive, indicated that appellant never reported taxable income in excess of $5,000 a year. (R. 173, 175.) Thus, an exhaustive investigation by Government agents, together with the record of appellant's previous income tax returns, proved conclusively that appellant did not have a prior accumulation of assets to account for the proven increase in net worth of $57,437.44 for the years 1946 and 1947.

It is the Government's contention that the evidence introduced at the trial conclusively proved that appellant had a beginning net worth of $10,525.00. However, even if it be assumed that the Government did

not conclusively prove beginning net worth, there is no doubt that the evidence introduced by the Government established a prima facie case of unreported income and that it was in the province of the Judge, as trier of the facts, to determine if the increase in net worth was unreported income, and whether there was intent to evade the tax on such unreported income.

**(3) There was sufficient evidence as to the source of the unreported income to sustain the determination of the trial Court that the increase in net worth represented taxable income.**

The appellant complains that a lucrative source of income has not been established. It apparently is his contention that the Government must prove specific unreported income earned from a specific provable source. Here again the appellant attempts to build up the burden of proof to an insurmountable barrier. The net worth method is used for the very reason that direct evidence is not available to prove specific unreported income and, therefore, of necessity, the Government must rely on circumstantial evidence to prove its case.

The Government is not required to prove specific unreported income or a specific source of unreported income. In the recent case of *McFee v. United States,* 206 F. 2d 872 (C.A. 9th 1953), this Court had occasion to consider a question of source in an income tax evasion case and stated at page 874:

> "The Government is not required to refute all possible speculations as to the source of funds from which the expenditures might have been

made. *Gariepy v. United States,* 6 Cir. 1951, 189 F. 2d 459."

and further on page 875 stated:

"The law is clear that proof of the exact amount or precise source of unreported income is not required. *Jelaza v. United States,* 4 Cir. 1950, 179 F. 2d 202; *Gariepy v. United States,* 6 Cir. 1951, 189 F. 2d 459. The jury was entitled to infer from the evidence that the unreported income came from one or all of the sources specified in the bill of particulars."

The Government, therefore, need not prove an exact source but must introduce evidence of a possible source. The Court in *Pollock v. United States,* (C.A. 5th 1953), 202 F. 2d 281, quotes with approval the instructions of the trial Court in a footnote at page 285 in which it is stated:

"The increase, if any, in net worth is presumed to be net income if certain conditions obtain. They, are, one, that there is evidence of a *possible source* or *sources of income* to account for the expenditures or the increased net worth; * * *" (Italics supplied.)

In the case at bar, there is evidence of several possible sources of unreported income. There is testimony in the record that appellant was well known as a gambler during the years involved (R. 171 and 188); that he worked in a gambling house during 1946 and part of 1947 (R. 91); that he gambled during the years involved (R. 66 and 68); that he had access to large sums of money (R. 94 and 95); and that he was

engaged in the liquor business, in partnership with his brother during the years 1947 to 1949, inclusive. There are also the admissions of defendant under oath to agents of the Bureau of Internal Revenue, that during all of the years 1946 to 1949, inclusive, he gambled and made money from that avocation. (Exhibit 7, pages 15 and 19.) On appellant's tax returns for the years 1945 to 1949, inclusive, no income from gambling is shown.

Income obtained from gambling or illegal sources is taxable.

*Rutkin v. United States,* 343 U.S. 130, 72 S. Ct. 571 (1952);

*United States v. Johnson,* 319 U.S. 503, rehearing denied 320 U.S. 808;

*United States v. Sullivan,* 274 U.S. 259;

*Benetti v. United States,* 97 F. 2d 263 (C.C.A. 9th 1938).

It is apparent that Judge Carter, after hearing the evidence, believed that the increase in appellant's net worth represented taxable income and that it came from one or all of the possible taxable sources indicated above.

**(4) There was sufficient evidence of intent to sustain the determination of the trial Court that the appellant willfully evaded his and his wife's income taxes for the years 1946 and 1947.**

The Government established beyond a reasonable doubt that appellant willfully intended to evade his taxes. The Government proved, by a search of the records of the Bureau of Internal Revenue, that appel-

lant had not filed a return before the year 1940 and from 1940 to 1947, inclusive, never reported any substantial income. (R. 172 to 175, inclusive.) Proof was introduced to show that during the years 1946 and 1947, while reporting only a small amount of income, appellant acquired a large amount of assets. (R. 42 to 63, inclusive, 108 to 122, inclusive.) The Government further proved that appellant was a gambler (R. 66, 171, 188), that he gambled during the taxable years 1946 and 1947 (R. 66, 68, Exhibit 7, pages 15 and 19), that he worked in a gambling establishment (R. 91), that he made conflicting statements concerning the source of his income (R. 157, 158, 159, 170, 195), and that he did not keep any books or records. (R. 107.)

Judge Carter in his memorandum and order of June 13, 1953, found that the conduct of appellant was willful and stated:

> "The defendant also contends that there was no fraudulent conduct on his part which could sustain a finding of wilfullness. The evidence shows no substantial income for a number of years prior to the tax period; expenditures during the tax period greater than the reported income for that period; failure to keep books and records; working in a gambling establishment during the tax periods; and conflicting admissions to the Government agents concerning the source of the money spent by defendant in excess of his reported income for the tax period. This picture fits the rule laid down in Remmer v. United States (supra) where it was said, 'Appellant argues in his reply brief that even if there

was sufficient evidence to show a tax deficiency there was no evidence of fraud. A state of mind can seldom be proved by direct evidence but must be inferred from all the circumstances. A wilful intent to evade income taxes may be inferred from such factors as appellant's failure to include a substantial amount of income on his and his wife's tax returns, the failure to keep adequate books which would clearly reflect income, and the concealment of the ownership of property such as a safe deposit box, real estate interests, and business licenses. These factors, all present in the instant case, are but part of a general pattern of conduct engaged in by appellant from which the jury could infer the requisite intent. See Norwitt v. United States 195 F. 2d 127, 132 (9th Cir. 1952).' "

The appellant does not argue this point and thus, apparently concedes that Judge Carter correctly decided the intent issue. In taking no exception to the Court's findings on willfulness, the appellant in effect admits that the Government has proved the willful intent to evade the tax. He objects to the decision of the Court only on alleged defects in technical proof of net worth.

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## II. THERE WAS SUFFICIENT PROOF OF THE CORPUS DELICTI TO WARRANT ADMISSION INTO EVIDENCE OF THE EXTRAJUDICIAL STATEMENTS OF THE APPELLANT.

This honorable Court has had occasion to consider the question of the admission of extrajudicial statements in three rather recent cases. In the case of

*Davena v. United States,* 198 F. 2d 230 (C.A. 9th 1952), cert. den. 344 U.S. 878, it was held that evidence corroborating the conviction need not independently prove the commission of the crime charged. This Court at page 231 of 198 F. 2d 230 stated:

> "It is now urged upon us that these extra-judicial statements of the defendant were improperly admitted into evidence because the crime was not proved independently of them, and thus that United States v. Fenwick, 7 Cir., 177 F.2d 488 requires a reversal. Whatever vitality the Fenwick case has in the light of United States v. Hornstein, 7 Cir., 176 F. 2d 217 which preceded it and appears to be in conflict, and United States v. Yeoman-Henderson, Inc., 7 Cir., 193 F. 2d 867, which strictly limits the Fenwick case, it is of no relevance in this circuit since here it is established that the evidence corroborating a confession of the defendant need not independently prove the commission of the crime charged, neither beyond a reasonable doubt nor by a preponderance of proof. This being the case, the admissions of the defendant which were fully corroborated were properly given to the jury."

In the case of *Spriggs v. United States,* 198 F. 2d 782 (C.A. 9th 1952), this Court reversed a conviction on the grounds that there was no independent evidence to substantially corroborate the admission of the defendant and cited the *Davena* case as an expression of the correct law. In the very recent case of *McFee v. United States,* 206 F. 2d 872 (C.A. 9th 1953), this Court in affirming the conviction observed at page 878:

> "A reading of the record convinces us that not only does the independent evidence substantially corroborate the admissions, which in this circuit is sufficient, Davena v. United States, 9 Cir., 1952, 198 F. 2d 230, but, contrary to appellant's contention, goes further and establishes the *corpus delicti* by competent independent evidence."

This honorable Court, therefore, agrees with the views expressed by Judge Learned Hand in *Daeche v. United States,* 250 F. 566, 517 (C.C.A. 2d 1918) and requires that there must be independent evidence to substantially corroborate admissions or confessions of a defendant, but that such independent evidence need not independently prove the commission of the crime charged.

In the case at bar, there is ample independent evidence not only to corroborate the several extrajudicial statements made by appellant but to establish the corpus delicti independently.

The Government proved an increase in appellant's net worth in the amount of $57,437.44 during the years 1946 and 1947 by testimony of competent witnesses and by stipulation, and this is not attacked in appellant's brief. The investigating agents testified that they made a thorough investigation and that their investigation showed that taxpayer had a large unaccounted for and unreported increase in net worth for the years 1946 and 1947. (R. 109 and 236.) Testimony was introduced that appellant was known as a gambler. (R. 171 and 188.) Witness Mandalari testified that appellant gambled with him in card

games. (R. 66.) Witnesses McNabb and Gianelli testified that appellant was employed in a gambling establishment in 1946 and part of 1947, (R. 77, 91, 93) and witness Gianelli testified that appellant had access to large sums of cash. (R. 95, 96, 97.)

It was, therefore, proved by independent evidence that taxpayer had a large unaccounted for increase in net worth during 1946 and 1947. It was further shown that appellant was a gambler and although spending large amounts of money and acquiring considerable property, kept no books and records of his financial dealings. The evidence showed that appellant suddenly appeared affluent in the years 1946 and 1947 and purchased several automobiles, a boat, a liquor store and a new home. (R. 52-58, incl.) It is submitted that this is most potent evidence that appellant received substantial income during these years and willfully failed to report it on his tax returns, thus intending to evade the tax. It is more than sufficient to corroborate his extrajudicial statements.

It is the position of the Government that the corpus delicti was established by competent independent evidence and that the admissions would be admissible even under the strict rule of the *Fenwick* case. There is certainly sufficient independent evidence to substantially corroborate the admissions, as is required by the *Davena* case. It is further the position of the Government that the extrajudicial statements of appellant were not necessary to, nor were they used to prove any essential element of this case. They were not used to prove receipt of any income or to establish

appellant's opening net worth. They were used, along with other evidence, to show that gambling was one of the possible sources of appellant's net worth increase. Therefore, even if the extrajudicial statements were inadmissible, it would in no way affect the proof in this case in that the Government by independent evidence proved several other possible sources of income. In fact, independent evidence was also introduced to show that appellant gambled. (R. 66, 68.)

The appellant's brief states over and over again that the statement of the appellant was conclusively established to be untrue. The Government vigorously disagrees with such conclusion. The testimony of Eva McNabb as to conversations had with appellant after he made the statement to the agents (R. 195) and after he refused to sign the statement (R. 196), is most potent evidence that the statement was true. The logical conclusion to be drawn from the unchallenged testimony of Eva McNabb is that appellant made a tactical mistake in admitting gambling income and was trying to recover his fumble by later denying such income. After refusing to sign the statement, the Government agents requested that appellant make another statement embodying the truth, and he refused to do so.

## III. THE TRIAL COURT DID NOT LOSE JURISDICTION TO PRONOUNCE JUDGMENT IN THAT THERE WAS NO DENIAL OF A SPEEDY TRIAL IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

The appellant contends as his first specification of error that the trial Court erred in denying appellant's motion in arrest of judgment on the grounds that the Court lost jurisdiction to pronounce judgment therein in that the appellant had been denied a speedy trial in violation of the Sixth Amendment to the Constitution of the United States.

The appellant argues by dint of quotation from the case of *Pinkussohn v. United State*s (C.C. 7th, 1937) 88 F. 2d 70, that the trial Court should have lost jurisdiction to pronounce judgment because of the long delay that elapsed in arriving at a verdict thereby violating appellant's rights under the Sixth Amendment to the Constitution. In the *Pinkussohn* case, which involves almost identical facts as are here present, the Court had no hesitancy in affirming the conviction. Appellant cites three cases:

*Ex parte Singer,* 284 Fed. 60 (1922);

*Ex parte Dellan* (C.C.A. 9), 1928, Calif. 26 F. 2d 243;

*Pratt v. United States* (1939), 102 F. 2d 275.

The three cases cited by the appellant are not in point inasmuch as the delay in these cases was occasioned principally after a conviction or a plea had been obtained and the delay was in the pronouncing of sentence on the defendant.

In addition the cases of *Ex parte Singer* and *Ex parte Dellan, supra,* were decided prior to the case of *Miller v. Aderhold,* 288 U.S. 206, wherein the Supreme Court resolves the conflict in the cases cited by the appellant and states at paragraph 1 on page 210, as follows:

> "The decisions on the point are in conflict. The greater number support the view of petitioner; but we are of opinion that the weight of reason is the other way. Several of the cases holding with petitioner are set forth in Mintie v. Biddle (C.C.A.) 15 F. (2d) 931, 933. While these cases and others are emphatically to the effect that a permanent suspension of sentence is void, and that the court thereby, with the passing of the term, loses jurisdiction, *we find no convincing reason in any of them for the latter conclusions.*" (Italics supplied.)

Rule 32(a) of the Federal Rules of Criminal Procedure provides that sentence shall be imposed without unreasonable delay.

In the instant case, the appellant was found guilty on June 13, 1953, and sentence was imposed on July 13, 1953, which delay in time was not prejudicial to the appellant. *State v. Beckwith* (1944) 57 N.E. 2d 193; *Iva Ikuko Toguri D'Aquino v. United States,* C. A. Cal. 1951, 192 F. 2d 338, rehearing denied 203 F. 2d 390, certiorari denied 72 S.Ct. 772, 343 U.S. 935.

Federal Rule 48(b) of the Federal Rules of Criminal Procedure provides:

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

This rule appears to have been fully complied with inasmuch as the defendant was indicted on November 26, 1951 and brought to trial on May 13, 1952.

This Court has had occasion to consider this problem in several cases, and in the case of *Daniels v. United States,* 17 F. 2d 339 (C.C.A. 9) stated:

> "No statute of the United States defines the time within which criminal accusations must be tried. In the absence of such a statute, it would seem that, if the accused fails in his efforts to bring the case on for trial, his only remedy would be to apply to an appellate court for mandamus. It has been so held. Frankel v. Woodrough (C. C.A.) 7 F. (2d) 796. It is also held that one may not acquiesce in the postponement of his trial from time to time, and then insist on dismissal because he has been denied a speedy trial. Phillips v. United States (C.C.A.) 201 F. 259; Worthington v. United States (C.C.A.) 1 F. (2d) 154, certiorari denied 266 U.S. 626, 45 S.Ct. 125, 69 L.Ed. 475.

The appellant has cited no statute or Federal Rule of Criminal Procedure which defines the time within which a criminal action must be tried. In addition

the record is barren of any demand by the appellant for a speedy trial. Under the circumstances the appellant has given an implied consent to any delay in this case.

*Appell v. United States,* 274 U.S. 744;

*Iva Ikuko Toguri D'Aquino v. United States,* (C.A. 9th 1951), 192 F. 2d 338, rehearing denied 203 F. 2d 390, certiorari denied 72 S. Ct. 772, 343 U.S. 935;

*Danziger v. United States,* (C.C.A. 9) 161 F. 2d 299, 301, certiorari denied 332 U.S. 769;

*Daniels v. United States,* (C.C.A. 9) 17 F. 2d 339, 344, certiorari denied;

*Rosenwinkel v. Hall* (C.C.A. 7 1932) 61 F. 2d 724;

*Worthington v. United States,* 1 F. 2d 154.

## CONCLUSION.

For the reasons heretofore stated, it is respectfully submitted that the judgment and sentence of the District Court should be affirmed.

Dated, San Francisco, California,
February 23, 1954.

Respectfully submitted,

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**(Appendix "A" Follows.)**

# Appendix "A"

## Appendix "A"

### LIST OF TRIAL COURT'S EXHIBITS.

#### Government's Exhibits.

*Exhibit No.*

1. The joint income tax return of Michael and Esther Campodonico for the year 1945.
2. The joint income tax return of Michael and Esther Campodonico for the year 1946.
3. The income tax return of Michael Campodonico for the year 1947.
4. The income tax return of Esther Campodonico for the year 1947.
5. The joint income tax return of Michael and Esther Campodonico for the year 1948.
6. The joint income tax return of Michael and Esther Campodonico for the year 1949.
7. Transcript of testimony of Michael A. Campodonico taken at a conference on May 4, 1950, at 608 California Building, Stockton, California.

#### Defendant's Exhibits.

A. Receipt issued by American Trust Company acknowledging payment of $3,524.69 by Michael A. Campodonico on August 31, 1943.